No. 643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ALMA HELM AGAJAN, ET AL., *Petitioners*,

v.

RAMSEY CLARK, Attorney General of the United States as Successor to the Alien Property Custodian, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, nonenemy stockholders of Helm Bros., Ltd., a Crown Colony of Hong Kong corporation, United Kingdom, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 30, 1967.

OPINION BELOW

The opinion of the court of appeals (App. C, pp. 8a-14a) is reported at 95 W.L.R. 1317.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1967 (App. C, p. 17a). The jurisdiction of this court is under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances a notice of claim timely filed by their corporation which revealed the name, address, nationality and percentage ownership in the corporation of each stockholder may be treated as having been filed in the interests of and on behalf of nonenemy stockholders of said corporation who did not separately file individual notices prior to February 10, 1955, for the purpose of their satisfying such filing requirement in sections 9(a) and 33 of the Trading with the Enemy Act.

2. If not, whether the principle of equitable tolling of the period of limitatons for filing notices may be applied to the nonenemy stockholders on whose behalf in 1965 an application for the administrative return was made to the President of the United States, and also as to those nonenemy stockholders who individually and separately filed in 1965 a notice with respondent's predecessor.

3. Whether in the circumstances the Trading with the Enemy is unconstitutional as to the nonenemy stockholders whose interests in the vested assets will have been taken without compensation therefor if the decision below is upheld.

4. Whether nonenemy stockholders of a corporation which acquired status as an enemy only on the occasion of the occupation of Hong Kong in 1941 by the Japanese Army have an interest in the assets of that corporation vested under the Trading with the Enemy Act which they can recover in a suit brought under Section 9(a) of said Act.

Constitutional Provision and Statute Involved

The pertinent portions of the Fifth Amendment of the United States Constitution and of sections 9(a) and 33 of the Trading with the Enemy Act are set forth in Appendix A, pp. 1a-2a.

STATEMENT

In 1899, Helm Bros., Ltd. was organized as a Crown Colony of Hong Kong corporation, United Kingdom, to engage in commerce in the Far East. At the outset of World War II, it was engaged in the business of stevedoring, landing, shipping, customs brokerage and warehousing with its principal office in Yokohama, Japan. In 1941 and 1950 the capital stock of the company was owned by some 74 persons. (See App. B, pp. 3a-7a) No one person owned more than six per cent. The stockholders were of many different nationalities and were scattered around the world in the United States, England, Portugal, France, Australia, Switzerland, Germany and Japan. When war started in 1941, Helm Bros., Ltd. was the owner of certain bearer bonds and debt obligations at the time in the custody of the then Guaranty Trust Company of New York. By Vesting Order No. 16,313 dated December 8, 1950, the respondent's predecessor vested those assets as property in the United States belonging to a national of an enemy. (See 15 Federal Register 9549

and 16 Federal Register 1112) On July 22, 1951, Helm Bros., Ltd. filed a "Notice of Claim for Return of Property", Form APC 1-A. Accompanying the Notice was a complete list of all its stockholders as of December 7, 1941 and also believed to be stockholders on December 8, 1950. (App. B, pp. 3a-7a) The list revealed the name of each stockholder, his address, nationality and the percentage of his holding in the company. As no stockholder owned more than ten per cent of the outstanding stock, the disclosure of the identities and nationalities was not required by the claim form or the questionnaire which accompanied the form. Nevertheless, in listing all the stockholders, the notice contained as complete information as was then available as to the enemy and nonenemy status of the stockholders, thus providing at the time of the July 1951 filing respondent's predecessor with detailed notice of the nonenemy interests in the vested assets. It was not until July 22, 1964 that the Department of Justice completed final action on the administrative claim in denying an administrative return to the corporation. The corporation did not thereafter seek relief by filing suit in the United States District Court for the District of Columbia inasmuch as its standing to do so was controlled by *N. V. Handelsbureau La Mola* v. *Kennedy,* 112 U.S. App. D.C. 92, 299 F. 2d 923, cert. denied, 377 U.S. 940, decided in the 1960's while the administrative claim was pending. But the denial of the claim made it clear in 1964 that the percentage interest in the vested assets represented by the holdings of the nonenemy stockholders could not be recouped through corporate action.

Thereafter, three separate steps were taken by or on behalf of the nonenemy stockholders. By letter of

October 8, 1965 (JA 6) to the President of the United States application was made on behalf of the 1941 stockholders and their successors in interest who were not enemies or allies of enemies for the return of their prorata share of the vested assets. This application was denied subsequently in a letter signed by Assistant Attorney General of the United States John W. Douglas. On or about November 29, 1965 some thirty-three persons (JA 6) asserting their nonenemy character as stockholders filed individual notices of claims on the Form APC-1A. Subsequently on December 23, 1965, Assistant Attorney General John W. Douglas denied these claims. In both instances of denial, the explanation was given that Section 33 of the Trading with the Enemy Act proscribed a return unless notice of claim had been filed not later than February 9, 1955. The final step was the institution on November 30, 1965 of the suit with which this petition is concerned. The suit was brought by plaintiffs named therein for themselves and on behalf of all other persons and interests as a class who are or were stockholders who are or were neither enemies nor allies of enemies within the meaning of the Trading with the Enemy Act. Each stockholder by virtue of his nonenemy character at all pertinent times asserts as his interest in the vested assets that fraction of the total present dollar value of such assets which the number of shares owned by him bears to the total number of shares issued and outstanding. Thus, had stockholders succeeded below respondent would nevertheless retain the full share of the vested assets represented by the enemy interests. The district court, however, dismissed the complaint with prejudice on August 18, 1966 (JA 9) and the court below affirmed (App. C, p. 14a).

REASONS FOR GRANTING THE WRIT

I. The Question Is Important

Petitioners comprise a group of persons who are citizens of the United States, of Great Britain and of other countries which were allied to the United States in the World War II effort against the Axis, and of countries that remained neutral. It is beyond argument that as loyal citizens or friendly or neutral aliens their personal assets in the United States were beyond the grasp of the Trading with the Enemy Act for the obvious reason that they were not the enemy. Petitioners were, nevertheless, stockholders of Helm Bros. Ltd., a British company engaged in business primarily in Japan. Their company came within the definition of "enemy" when the Japanese occupied Hong Kong. Thereafter, assets of that company in the United States were subject to seizure. Its only assets in the United States were bearer bonds and evidences of indebtedness and these were vested on December 8, 1950, more than 5 years after actual hostilities had ceased. Their corporation undertook to obtain the return of those assets, an effort which stretched over some thirteen years, during which period, according to the Court below and specifically on February 9, 1955, the time ran out for the friendly stockholders to assert their separate claim by filing a notice, notwithstanding that their corporation which had filed a timely notice had included with it as full information as to the nonenemy or friendly interests as multiple individual notices filed by individual nonenemy stockholders would have supplied. Practically stated, the question is whether that part of the vested assets represented by friendly or nonenemy interests is, along with the part represented by

the enemy interest, to be paid into the War Claims Fund merely because individually and separately the same information that respondent's predecessor already had in his possession was not duplicated by individual notices filed by those friendly interests some time prior to February 10, 1955.

The question is important because if the answer is yes, the interests of petitioners in the assets, their right to an aliquot share, expired merely by the passage of time and their failure within that time to pursue an intermediate procedural step to duplicate information already in the Government's possession. As to them, therefore, the statute worked a forfeiture with the Government's appropriation permanently of their property interests without compensation in contravention of the Fifth Amendment.

The court below did not deal with the constitutional issue presented in petitioners' briefs. The point, however, cannot here be overlooked that a serious doubt exists whether the remedy in Section 9(a) as to these petitioners is an adequate one. The fact is that at all times since December 8, 1950 to the present the position of the respondent and his predecessors has consistently been that stockholders of a corporation the assets of which have been vested under the Trading with the Enemy Act do not have a severable interest that they may validly assert a claim to in a separate action brought by them under the Act. See the discussion of this question contained on pages 18-19 of this petition. A time limitation on taking appropriate action to protect an interest should not be subject to constitutional doubt if it is perfectly clear that the statute providing a remedy invests a claimant with a property

interest. But it is difficult to conclude that the statute clearly invests these petitioners with a property interest when the Government consistently has adhered to the position that nonenemy stockholders do not have an interest. The mere existence of a doubt as to the meaning of the Act constitutes a formidable handicap in the formulation of any plan to bring themselves within its provisions. The action of the Government in this case involves the exercise of the summary power of seizure of interests in property that petitioners claim belonged to United States citizens or citizens of allied or neutral countries. Accordingly, to deny petitioners the opportunity to assert their claim does raise a serious constitutional question. See *Becker Steel Company of America,* 296 U.S. 74, 79.

II. The Construction of an Important Federal Statute Is Involved

Section 9(a) of the Act was enacted as remedial legislation and petitioners urge that its provisions should be liberally construed to give effect to its remedial purpose. The Court below said, however: "But it would overstrain the structure and language of the Act to construe this notice [Notice of Claim filed by the corporation] as one filed by the shareholders. Neither the language of the Act nor elsewhere is their evidence of an intention on the part of Congress that a corporate entity should be considered to be identical with the individual entities who are its shareholders." (App. C, p. 10a) Thus, the Court adopted a literal, strict, formalistic test of compliance to exclude petitioners from a judicial remedy. It was petitioners' prime contention that they as stockholders should be regarded as claimants on whose behalf their corporation in 1951

filed a timely notice of claim.[1] Unless the statute is read to give effect to their contention, they will be without any remedy as Section 7 of the Act expressly states that "the sole relief and remedy . . . shall be that provided by the terms of this Act . . ." If the nonenemy stockholders are precluded from maintaining the suit because they literally failed to satisfy a procedural requirement of individually and separately filing notices, such application of the requirement works a serious hardship as to them and runs contrary to the spirit of *Kaufman* v. *Societe Internationale,* 343 U.S. 156 (1952), where this Court insisted that rights of innocent stockholders must be fully protected.

But courts of appeals and this Court have on past occasions recognized that improper results and hardships would be imposed by a literal reading of some provisions of the Act, and by liberal construction instead of literal and mechanical application of its language in areas other than the one involved in this case have aborted results that Congress never intended.

In *Guessefeldt* v. *McGrath,* 342 U.S. 308, 72 S. Ct. 338 (1952), the majority refused to apply a strict literal reading of the statute to deny a German national the opportunity to maintain a Section 9(a) suit. Justice Frankfurter, speaking for the majority, wrote:

> The concern with the Trading with the Enemy Act is with the problems at once complicated and

[1] In his well-known treatise the author noted that in numerous instances courts of equity look behind the corporation to recognize its rights as being in reality the rights of its stockholders and will not allow the legal fiction of a distinct corporate entity to obstruct justice. See *Clark on Corporations,* Hornbook Series, 3d Edition, p. 13.

> far reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wide latitude of construction in enforcing its purpose."

The importance of relief under Section 9(a) to nonenemy persons who became innocent victims of the Act in war was always to be stressed, an emphasis which the courts recognized as demanding a wide latitude of construction. In *Miller* v. *Robertson,* 266 U.S. 243, 45 S. Ct. 73 (1924), the Supreme Court construed broadly the former Section 9 permitting nonenemies to sue for debts to include in the definition of debt damages resulting from breach of contract. In applying the broader inclusive definition the Court said (266 U.S. 248):

> "* * * The purpose of Section 9 was to prevent or lessen losses and inconvenience liable to result to nonenemy persons. The provision is highly remedial and should be liberally construed to effect the purpose of Congress and to give remedy in all cases intended to be covered. (citations omitted) The just purpose of the section is not to be defeated by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations. (citation omitted)"

Clearly in the case at bar it was not the intention of Congress that nonenemy stockholders were to be stripped of their nonenemy interest when the full disclosure of those interests was on file as part of the Government's records in the case in 1951, simply because some time prior to February 10, 1955 each stockholder had not duplicated in a separate notice the in-

formation that the Government already had in its possession. The fact was that the Government already was on notice and the functions of notice that the filing of a notice of claim was to serve already had been fulfilled in July of 1951 by the unrequired disclosure of detailed information concerning stockholder interests.

In *Markham* v. *Cabell,* 326 U.S. 404 (1945), the Supreme Court in sustaining an action on a debt incurred after October 6, 1917 which was banned expressly by the terms of the unrepealed Section 9(e) of the Act said at page 409:

> "* * * The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate a seeming harshness or to qualify its apparent absolutes as *Holy Trinity Church* v. *United States,* 143 U.S. 457 illustrates. The process of interpretation misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

The Seventh Circuit in *Kaku Nagano* v. *McGrath,* 187 F. 2d 759 (C.A. 7 1951), adopted a liberal construction of the language of the Act to give effect to the purpose of Congress. At page 765 the Court said:

> "* * *It is beyond question that in time of war the Executive . . . has been authorized to seize property whenever it is suspected that it may be enemy property, but Congress, though recognizing the necessity of the broadest power in this respect in the Executive, has at all times evinced an intent not to keep from loyal residents, whether alien or citizen, nonenemy property which is rightfully in America, has served no enemy purpose and has threatened to serve none. Such was the administrative policy expressed by the Custodian in his

> presentation to the Congressional Committee, where he said that on occasion he had found it necessary to vest property which he later discovered he was not entitled to keep. * * * He added that subsequent investigations might indicate that he had been mistaken, and, in such case, the property should be returned. * * *"

Thus, the court of appeals, in reversing and remanding, refused to apply literally the language of the then recently enacted Section 39 of the Trading with the Enemy Act that expressly barred a Japanese citizen because he was a national of an enemy country from exercising a statutory right to sue under Section 9(a) of the Act.

In *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C.A. 9, 1926), overruling the District Court's decree of dismissal, the court refused to apply a formalistic and literal reading of the statute and thus permitted a surgeon of German nationality who served the German Army in the Red Cross in World War I, to maintain an action under Section 9 of the Act. The court noted that although the surgeon's German nationality brought him within the literal definition of enemy, he was not brought within the spirit of the statute or the intention of Congress.

Although the court decisions discussed above did not construe the specific language in Sections 9 and 33 involved with this petition, their strong intimations favor a liberal reading of the provisions of the Act. A liberal interpretation of the condition to suit would preserve the remedy for stockholders who were eligible as neither enemies nor allies of enemies of bringing the district court action on November 30, 1965. In thus giving effect to the congressional intent of seizure and

retention of property belonging to enemies only, such liberal construction would be consistent with its remedial purpose. Such construction, it is submitted, would not impute to Congress an intention "that a corporation should be considered to be identical with the individual entities who are its shareholders," as suggested by the court below. Nor would it "overstrain" the meaning of the language. The decision sought to be reviewed here applied a strictly literal reading to foreclose the nonenemy stockholders from judicial relief, a construction which is inconsistent with past decisions by this court and other courts which refused to follow a strictly literal application of the statutory language. The extent to which the literal and narrow application by the lower court of the Act's remedial provision is inconsistent with prior decisions of this and other courts according a wide latitude of construction in enforcing its purpose provides an additional reason why this Court should grant certiorari.

III. The Decision Below Is in Other Respects Wrong

(a) According to the lower court's interpretation, a claimaint to be eligible under Section 9(a) to make formal application to the President for return must first have filed a notice of claim with the Alien Property Custodian. In thus reading the statute the court would have a claimant duplicate actions in the Executive Branch of the Government. But obviously, duplication of effort with its attendant hardship on claimants was not intended by Congress, as it would serve no meaningful purpose. Nor is such interpretation calling for duplication necessitated by the language of Section 9(a). That language is plain that a claimant who has made an application to the President may

then proceed to bring an action in the district court. The only question is whether Section 33 which became part of the Trading With the Enemy Act in 1946 cut off so far as these claimants are concerned a substantive right to sue in the district court. Petitioners contend that it did not and urge that the first sentence of Section 33 simply imposes a time limitation on the administrative return of property by the Alien Property Custodian, and in failing to require the filing of an application with the President some time within two years of vesting and not later than February 9, 1955 as condition to suit, Section 33 as enacted preserved such substantive right in Section 9(a).

(b) The court below interprets also erroneously the tolling provision in the second sentence of Section 33. The time within which the district court action below was instituted on November 30, 1965 was not due to happenstance. Petitioners were careful that their suit was instituted not later than two years from vesting, excluding the time (13 years) that their corporation's notice was pending. The language of the second sentence of Section 33 which is concerned with the time only for filing suit does not say, as the court below suggests, that the pending claim that tolls the period must be owned by the identical claimant or claimants who file the suit. A plain reading would inform the reader that if a suit or claim was pending the two-year period of limitation for bringing suit in the district court was tolled.

This additional confusing aspect of the interplay of Sections 9(a) and 33 has not to petitioners' knowledge been passed upon by this or any inferior court. But the inequities and hardships that a rigid application of their provisions was anticipated in a

comment in 62 Yale Law Journal 1210, 1232 where it was specifically said: "If no corporate suit is pending, a shareholder should be able to rely on previous 9(a) or 32 corporate action to toll the statute of limitations for his own section 9(a) suit." The article urged that the statute should be interpreted to extend the limitation period for shareholder actions subsequent to corporate claims or suit.

(c) Additionally, the decision below is in error in failing to treat the collective action of all the nonenemy shareholders who on October 6, 1965 filed an application to the President of the United States as tantamount to filing a notice of claim, for the purpose of meeting the condition to suit contained in Section 9(a). Petitioners urge that the collective action was taken on behalf of all nonenemy shareholders and was in addition to the action individually taken by some 33 nonenemy shareholders who separately filed notices of claim in November of 1965 and prior to instituting suit. The denial of the application to the President that was communicated by the Assistant Attorney General contained a recitation of the delegation by the President to him of authority to act regarding such claims as the applicants may have. If this court grants this petition and agrees with petitioners' contention, they urge that the collective action of October 6 be treated as fulfilling the condition precedent to suit of having filed a notice of claim, so that all nonenemy stockholders may be represented and not just those who individually in 1965 filed notices.

(d) Petitioners contend that the disposition by the lower court of the issue of equitable tolling is erroneous and contrary to the holding by this Court in

Honda v. *Clark*, 386 U.S. 484, (1967). Admittedly, the *Honda* involved creditors' claims under Section 34 of the Act concerning which the Supreme Court found an analogy to the Bankruptcy Act that pointed the way to the decision. The instant case, of course, differs in that it arises out of a title claim under Section 9 of the Act and the identical analogy would not apply. Petitioners, nevertheless, urge that the pronouncement in *Honda* on the equitable tolling principle should be applied with even greater force as to them to toll the period for taking administrative action while the corporate notice was pending. If this Court permits the period to be tolled for petitioners, it is submitted that the period of limitation for appellants to file administratively a notice of claim was the time between the date of vesting (December 8, 1950) and February 9, 1955 (as stated in Section 33 of the Act) reduced by the number of days between December 8, 1950 and July 22, 1951 (the date that Helm Bros., Ltd. filed its administrative notice of claim). The tolling of the period of limitation as to appellants would then be lifted July 22, 1964 when the corporate administrative claim was finally dismissed, and thereafter until the bringing of the suit below or the filing of further administrative claims. If this Court permits the tolling, it is submitted that the action taken on October 8, 1965 in making an application to the President of the United States and the action of some of the appellants who individually filed notices of claim with the Office of Alien Property should be construed as satisfying the condition precedent to the suit below.

The circumstances of nonenemy stockholders of Helm Bros., Ltd. provide a stronger case for tolling than were involved in *Honda*. In the case of the latter the claimants who were depositors individually were

actually notified by the Office of Alien Property of the vesting of their interests and thereafter were again notified that they had 60 days after the publication of the schedule of payments to bring suit. In most cases the claimants personally received such warning. In the case of the nonenemy stockholders of Helm Bros., Ltd., however, no such notification or warning ever was given to the American and nonenemy stockholders, although the existence of their interests was fully known to the Office of Alien Property when the corporation in July of 1951 filed a notice. Apparently, the reason for not serving warning that rights to nonenemy interests that were vested would expire on February 9, 1955 was that the appellee's predecessor refused to recognize that nonenemy stockholders had any protectable interest in such assets, although he must have known that as of November 23, 1953 at least one judge of the District Court of the Southern District of New York had ruled that a stockholder of an enemy-domiciled corporation may have the value of his stock out of the assets of said corporation seized pursuant to the Act. (App. D, pp. 15a-16a) As the nonenemy interests were without any notice at all, the reason for invoking the equitable doctrine of tolling is stronger than in *Honda*.[1]

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[1] The court below apparently was influenced by stockholder reliance on the notice filed by their corporation which subsequently "did not succeed in freeing itself of enemy character." (App. C, p. 14a) The court, however, made that observation without the benefit of knowing that on March 19, 1942, the assets of the corporation were placed under the control of a Japanese enemy property custodian by order of the Minister of Finance in accordance with the Enemy Property Custody Law. After the cessation of hostilities, on November 17, 1950 the Supreme Commander for Allied Powers directed the Minister of Finance to take necessary action to remove the custodian from commercial registration of the corporation, and to restore the vested assets to their owner, in ac-

Although there are dissimilarities in *Honda* and the instant case, it is apparent, nevertheless, that the basic considerations that induced this Court to toll the period of limitation for depositors in *Honda* while the *Abe* action was pending are applicable in the instant case.

IV. The Court Should Decide That Nonenemy Stockholders Have an Interest That They May Independently Assert

Should this Court reverse the lower court either by holding that the notice of nonenemy interests contained in the notice filed by the corporation in 1951 was a sufficient compliance with the notice filing requirement, or that the time for filing a notice was tolled for the period that the corporate notice was pending, petitioners urge this Court to resolve at this time the question which the lower court did not reach, namely whether nonenemy stockholders of an "enemy" corporation have standing to bring an action for an aliquot share of the vested assets.

It appears that this issue was litigated at district court levels in only two instances. In memorandum decision in a preliminary proceeding in *Taterka* v. *Brownell* Civ. 85-31, S.D.N.Y. 1953 (unpublished), (See App. D, pp. 15a-16a), Judge Sidney Sugarman ruled that a nonenemy stockholder of an enemy-domi-

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cordance with procedures for the restoration of property in Japan to nationals of the United Nations. By 1952 all assets in Japan were restored to the corporation, and additionally the Japanese Government paid some 30 million yen in reparations to the company. Little wonder is it, therefore, that stockholders could reasonably rely on their corporation as a national of the United Nations to retrieve assets in the United States. Additionally, it was not until 1964 that the determination of the ineligibility of corporations similarly situated to recover in a section 9(a) suit was finally made. See *N.V. Handelsbureau La Mola* v. *Kennedy, supra.*

ciled corporation may have the value of his stock out of the seized assets, and relied upon the decision of this court in *Kaufman, et al.* v. *Societe Internationale, supra. Albert* v. *McGrath,* 104 F. Supp. 891 (S.D. Cal. 1952), vacated on other grounds, 219 F. 2d 602 (C.A. 9, 1954) was a holding that under the *Kaufman* decision nonenemy stockholders do have a severable interest but only if they are in fact nonenemy stockholders of a nonenemy corporation.

Petitioners assert that the narrow interpretation of *Kaufman* by the district court in *Albert* v. *McGrath* was erroneous. Although the decision in *Kaufman* involved stockholders of a corporation (Interhandel) organized under the laws of Switzerland, a neutral country, the basic arguments advanced by the Government in opposition would apply with equal force were the petitioners in that proceeding stockholders of an enemy corporation. No distinction was made either in the briefs [1] or the opinion, and it is submitted, none should exist.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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September 1967

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[1] Supreme Court, U.S., Transcript of Records and File Copies of Briefs, Vol. 45, Case No. 172.

APPENDIX A

Constitutional Provisions and Statutes Involved

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

> "* * * nor shall any person . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

9(a) of the Trading with the Enemy Act, as amended (Act of October 6, 1917, ch. 106, § 9, 40 Stat. 419, 50 U.S.C. App. § 9):

> "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: PROVIDED, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute

a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *"

Act of August 8, 1946, ch. 878, 81, 60 Stat. 930, 50 U.S.C. App. § 33:

"No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from the enactment of this amendment (February 9, 1954), or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32 (a) hereof."

APPENDIX B

Supplement to Item (i), Schedule 9B, Supplementing Form APC-1A, Item 9

No shareholder has at any time since March 1, 1938, held ten per cent or more of the shares of Helm Bros., Ltd. We set forth, however, the names of all the shareholders of the company as of 1941, together with addresses of as many as are known. We believe that there has been no movement of shares since 1941. Helm Bros., Ltd., has only one class of shares.

Name	Address	Citizenship	No. of Shares	Percentage of Class
F. J. Abbot	c/o Hongkong & Shanghai Bank, Naka 9th Bldg., Maranouchi, Toko, Japan.	Great Britain.	112	.80
G. C. Allcock	1069 Shioya, Tarumi-ku, Kobe, Japan	"	20	.14
J. Barker	Stretton Court, Parkstone, Dorset, England.	"	10	.07
L. Bernard	74 Ozatomachi, Honmoku, Yokohama, Japan.	"	260	1.85
H. A. Chapman	271 Dartmouth Street, Boston, Massachusetts, U.S.A.	"	10	.07
F. H. Clark	c/o J. Newns, Lacon House, Theobalds Road, London WI, England.	"	60	.42
M. Collier	64 Rosemont Cresent, Westmount, Montreal 6, Canada.	"	80	.57
R. L. Eddison	c/o Chartered Bank of India, Australia & China, 18 Nihon Odori, Yokohama, Japan.	"	56	.40
T. L. Eddison	c/o Chartered Bank of India, Australia & China, 18 Nohon Odori, Yokohama, Japan.	"	56	.40

Name	Address	Citizen-ship	No. of Shares	Percentage of Class
D. D. Gunn	c/o Hongkong & Shanghai Bank, 2 Kaigan Dori, Kobe, Japan.	"	20	.14
L. J. Healing	c/o Burnett & Davy, 86/87 Wimpole Street, London WI, England.	"	564	4.02
M. A. Healing	c/o Burnett & Davy, 86/87 Wimpole Street, London WI, England.	"	82	.58
H. V. Henson	c/o White & Leonard, 4 St. Bride's Street, Ludgate Circus, London.	"	40	.28
C. Heseltine	"Black Braos," Farm Lane, Ashstead, Surrey, England.	"	56	.40
C. E. Maligny	19 Abbotswood, Guildford, Surrey, England	"	72	.51
D. M. Moore	c/o Marsden, Burnett & Davy, 86 Wimpole Street, London, W. I., England.	"	60	.42
E. F. Owston	"Sylvans," Telford Road, Farnham, Surrey, England.	"	316	2.25
F. G. Sale	c/o G.f. Sale, 10 St. Swithens Lane, London E.C.1, England.	"	10	.07
D. E. Smith	c/o Hongkong & Shanghai Bank, 2 Kaigan Dori, Kobe, Japan.	"	400	2.85
G. G. Waller	c/o Hongkong & Shanghai Bank, 9 Gracechurch Street, London E.C. 3, Enlgand.	"	10	.07
J. G. Waller	c/o Hongkong & Shanghai Bank, 9 Gracechurch Street, London, E.C. 3, England.	"	430	3.07
A. H. Agajan	3658 Redwood Road, Oakland, California, U.S.A.	United States	260	1.85
Frazar Estate Co.	c/o E. E. Welty, Naka 6 Bldg., Chioda-ku, Tokio, Japan.	"	100	.71
E. W. Frazar	520 Ocean Dunes Road, Daytona Beach, Florida, U.S.A.	"	281	2.00

Name	Address	Citizenship	No. of Shares	Percentage of Class
A. E. Fisher	c/o J. E. Fisher, 8 Nichome, Nihonbashi-Edobashi, Tokio, Japan.	"	107	.76
E. Harlow	c/o Chartered Bank of I.A.C. 9 Kaigan Dori, Kobe, Japan.	"	30	.21
Betty Helm	533 Boulevard Way, Piedmont, California, U.S.A.	"	14	.10
Donald Helm	533 Boulevard Way, Piedmont, California, U.S.A.	"	9	.06
Elizabeth Helm	827 Brookwood Road, Oakland, California, U.S.A.	"	176	1.25
Julius F. Helm	533 Boulevard Way, Piedmont, California, U.S.A.	"	557	3.97
Louise Helm	3032 58th Avenue, Oakland, California, U.S.A.	"	814	5.81
Ruth Helm	1336 El Camino Real, Burlingame, California, U.S.A.	"	79	.56
M. Laffin	c/o M. C. Cooke, Jr., Fukoku Bldg., Uchisaiwaicho, Tokio, Japan.	"	342	2.44
R. A. Macnab	c/o F. L. Lich, 84 Espenanla Avenue, Sierra Madre, California, U.S.A.	"	240	1.71
H. F. Metcalfe	c/o R. Meiklejohn, 96 Wall Street, New York, N. Y., U.S.A.	"	40	.28
W. R. Mayers	101 40th Avenue, San Mateo, California, U.S.A.	"	307	2.19
G. M. Westley	c/o R. Meiklejohn, 96 Wall Street, New York, N. Y., U.S.A.	"	40	.28
B. Stucken	533 Boulevard Way, Piedmont, California, U.S.A.	"	721	5.15
M. Helm Stone	454 South Hartford, Avenue, Los Angeles, California, U.S.A.	"	260	1.85
G. H. Webster	135 South Westgate, West Los Angeles, California, U.S.A.	"	260	1.85

Name	Address	Citizenship	No. of Shares	Percentage of Class
Joyce Silva	3148 Kingsland Avenue, Oakland, California, U.S.A.	Portugal	79	.56
J. Boixo	1202 Masaka, Isogo, Isogoku, Yokohama, Japan.	France	540	3.85
Masaye Kimura	c/o C. Machard, LaJoconde Anse de Maldorme, Marseille, France.	"	300	2.14
M. L. Piq	32 Balfour Road, Rosebay, Sydney, Australia.	"	296	2.11
G. Amberg	P. O. Box 289, Sannomiya, Kobe, Japan.	Switzerland	20	.14
A. Liessfeld	c/o Becker & Co., 9 Kinukasacho, Osaka, Japan.	"	83	.59
M. Strahler	c/o E. E. Welty, Naka 6 Bldg., Chiodaku, Tokio, Japan.	"	72	.51
K. Bunting	97 Yamamoto Dori, Kobe, Japan.	German	20	.14
G. Erich	36 Langgassee, Wiesbaden, Germany.	"	40	.28
J. Baasch	c/o Universal Trading Co., 8-4chome, Nihonbashi, Tokio, Japan.	"	25	.17
E. H. Harmssen	Steinacher Street I, Berlin, Schoeneberg, Germany.	"	107	.76
Dorothy Helm	Mueller Street 6, Wiesbaden, Germany.	"	100	.71
Helmer R. Helm	19 Hannum Drive, Ardmore, Pennsylvania, U.S.A.	"	100	.71
Helmut R. Helm	36 Langgassee, Wiesbaden, Germany.	"	100	.71
Margaret Helm	36 Langgassee, Wiesbaden, Germany.	"	100	.71
Veronica Helm	19 Hannum Drive, Ardmore, Pennsylvania, U.S.A.	"	100	.71
Wilhelm Helm	36 Langgassee, Wiesbaden, Germany.	"	263	1.87

Name	Address	Citizenship	No. of Shares	Percentage of Class
Wilhelm C. Helm	36 Langgassee, Wiesbaden, Germany.	"	365	2.60
James Helm	4534 Fairbairn Avenue, Oakland, California, U.S.A.	"	1065	7.60
Elsie Helm	374 Honmoku Motomachi, Nakaku, Yokohama, Japan.	"	436	3.11
Louisa Helm	374 Honmoku Motomachi, Nakaku, Yokohama, Japan.	"	436	3.11
Paul Helm	Germany	"	58	.41
Anna Henkel	1120 East 28th Street, Oakland, California, U.S.A.	"	100	.71
A. M. Meyerink	Germany	"	20	.14
A. Schirbaum	c/o Reich, 233 Sannotani, Honmoku, Nakaku, Yokohama, Japan.	"	100	.71
H. Tofohr	Junfernstieg 51, Haus Alstereck, Hamburg 36, Germany.	"	20	.14
H. Hiromaki	1588 Kaigan, Yanagishima, Chigasaki, Japan.	Japan	196	1.40
Walter H. Helm	43 Yamashitacho, Yokohama, Japan.	"	612	4.37
Ikeda Hana	65 Itchome, Honmokumachi, Nakaku, Yokohama, Japan.	"	22	.15
Ume Kawatani	94 Kitanocho, Sanchome, Kobe, Japan.	"	90	.64
Shigeru Mori	43 Nichome, Nogishimachi, Nakaku, Yokohama, Japan.	"	10	.07
Yuki Tomii	618 Honmokumachi, Tentokuji, Nakaku, Yokohama, Japan.	"	8	.05
Motoe Watanabe	339 Miyakami Yugawaramachi, Kanagawaken, Japan.	"	616	4.40
Haru Suzuki	5126 Jukkenzaka, Chigasakimachi, Kanagawaken, Japan.	"	140	1.00
		Total Shares	14,000	99.69

APPENDIX C

Opinion and Judgment Below

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20520

ALMA HELM AGAJAN, ET AL., APPELLANTS

v.

RAMSEY CLARK, Attorney General of the United States, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided June 30, 1967

Mr. A. Noble McCartney for appellants.

Mr. Bruno A. Ristau, Attorney, Department of Justice, with whom *Messrs. David G. Bress,* United States Attorney, and *Morton Hollander,* Attorney, Department of Justice, were on the brief for appellee.

Before FAHY,* BURGER and MCGOWAN, *Circuit Judges.*

FAHY, *Circuit Judge:* Appellants filed complaint in the District Court against the Attorney General[1] as successor to the Alien Property Custodian. They allege they are non-enemy shareholders of Helm Bros., Ltd., a corporation of the United Kingdom, Hong Kong. Certain of its assets were vested December 8, 1950, by appellee's predecessor as assets of an enemy as that term is defined in the Trading with the Enemy Act, 50 U.S.C. App. § 2. The vestiing

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* Circuit Judge Fahy became Senior Circuit Judge April 13, 1967.

[1] This suit was originally brought against Nicholas deB. Katzenbach, Attorney General, and on appeal his successor, Ramsey Clark, was substituted. D.C. Cir. R. 28(b).

order set forth as the corporation's last known address and principal place of business Yokohama, Japan, and stated the corporation was a national of a "designated enemy country (Japan)." Hong Kong was occupied by Japan on or about December 25, 1941. The corporation thus became an "enemy" within the meaning of the Act. *N. V. Handelsbureau La Mola* v. *Kennedy*, 112 U.S. App. D.C. 92, 299 F.2d 923; *cert. denied*, 370 U.S. 940.

On July 22, 1951, the corporation, pursuant to Sections 32(a)(2)(E) and 9(a) of the Act, filed notice of claim for return of the vested property. The Custodian dismissed the claim thirteen years later, July 22, 1964.

On October 8, 1965, there was filed with the President of the United States an application on behalf of the 1941 stockholders of the corporation "and their successors in interest who were not enemies or allies of enemies for return of their pro-rata share of the vested assets." Since the President had delegated his powers and duties under the Act to the Alien Property Custodian,[2] and thereafter these powers and duties were transferred to the Attorney General,[3] the stockholders' application was referred to the Attorney General. The Attorney General on October 27, 1965, denied the application as untimely. During November 1965 thirty-three of the same shareholders also filed individual notices of claims with the Office of Alien Property. There followed this suit of appellant shareholders, in which they assert their non-enemy character and also that as shareholders they have equitable interests in the vested assets of the corporation.

The Attorney General moved to dismiss the suit, contending the District Court lacked jurisdiction due to the

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[2] Exec. Order No. 9095, 7 Fed. Reg. 1971, March 11, 1942, 50 U.S.C. App. § 6.

[3] Exec. Order No. 9788, 11 Fed. Reg. 11981, October 14, 1946, 50 U.S.C. App. § 6.

shareholder's failure to file a timely notice of claim prior to commencing suit. The District Court granted the motion, dismissing the cause with prejudice.

Appellants contend that as non-enemy shareholders they had separate interests in the corporate assets which could have been returned to them under the reasoning of *Kaufman* v. *Societe Internationale;* 343 U.S. 156, 160. We need not consider this contention. Their suit was properly dismissed in any event unless the notice of claim filed by the corporation is construed as if it were a notice of claim filed by them. The first sentence of Section 33 of the Act provides,

> No return may be made pursuant to section 9 or 32 . . . unless notice of claim has been filed . . . in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from February 9, 1954, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later.

Appellants as shareholders filed no notice of claim within the period thus prescribed. They rely upon the notice filed July 22, 1951 by the corporation. This was not a notice of claim of these appellants. It did set forth details respecting all the corporation's shareholders, with their names and addresses, nationalities and percentages of ownership. But it would overstrain the structure and language of the Act to construe this notice as one filed by the shareholders. Neither in the language of the Act nor elsewhere is there evidence of an intention on the part of Congress that a corporate entity should be considered to be identical with the indivjdual entities who are its shareholders.

Appellants point to the fact that on October 8, 1965, as we have stated, they filed an application to the President, under Section 9(a) of the Act, which was referred to the

Attorney General, who denied it as untimely on October 27, 1965. This application does not help appellants' case; it does not dispense with the requirement that a notice of claim shall have been previously filed within time. The scheme of the Act, for obtaining return of vested property, is for such a notice to be filed in the case of property vested on or after December 18, 1941, not later than February 9, 1955, or two years from the vesting, whichever is later. Only when this has been done may application be made to the President for return of the property. And if we are right in our view that the corporation's notice of claim was not that of these shareholders, their application to the President was of no avail.

We now consider whether provisions of the Act authorizing suits for return of property were complied with and, if so, whether this obviated the necessity of a timely notice of claim. Section 9 provides that if the President shall not order return of property within sixty days after application to him is made, or if the claimant "shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity . . . to establish the interest, right, title, or debt so claimed." It is sufficient to point out that this provision for suit is conditioned upon the filing of a notice of claim. Only upon compliance with this condition is one brought within the class of claimants who are entitled either to apply to the President or to sue.[4] The second sentence of Section 33, to pursue the matter further provides,

> No suit pursuant to section 9 . . . may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in

[4] We think the timeliness requirement of the first sentence of Section 33 applies to the notice of claim required by Section 9 to be filed before suit, thus excluding those appellants who unseasonably filed notices of claims during November 1965.

> the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof. . . .

Deducting from the period December 8, 1950, when the vesting order was made, to November 30, 1965, when the shareholders' suit was filed, the period any claims were pending—July 22, 1951 to July 22, 1964 (the corporate claim) and October 8, 1965 to October 27, 1965, or possibly to November 30 as to thirty-three of the appellants (the shareholders' claims) we arrive at less than two years;[5] so that were the corporation's claim to be considered that of appellants, the pendency of the claims would save the timeliness of appellants' suit. However, the language of the Act excluding from the two-year period the time a claim[6] was pending refers to a claim for the same interest involved in the suit which is filed; and we have expressed our opinion that the suit of these shareholders is not for the same interest involved in the claim of the corporation; so that the corporation's claim did not serve to toll the time within which the shareholders were required to sue.

We have considered, with the aid of memoranda from the parties, whether *Honda* v. *Clark*, 386 U.S. 484, should lead to a different result. There, in the circumstances of the case, it was held that applicable equitable principles required a conclusion, with respect to certain creditors[7] having claims against enemy assets vested under the Act,

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[5] 14 years, 11 months, 22 days, less the total of 13 years, 1 month and 22 days, equals 1 year and 10 months.

[6] No suit was pending.

[7] The claimants referred to were depositors of a bank whose funds were vested.

that the pendency of the suit of one of the creditors to determine whether the value of the claims was to be calculated at the rate of exchange at the time of vesting or at the inflated post-war rate, tolled the time within which the suits of these other creditors need be filed. The situation of appellants is not in all respects dissimilar to those involved in *Honda;* for example, it is true here as it was there that the success of the claimants would not adversely affect the United States Treasury. "The only persons who might eventually benefit from the surplus are those general beneficiaries of the War Claims Fund into which any surplus is deposited." *Honda, supra* at 498. But the dissimilarities prevent our case from being controlled by *Honda.* The creditors there were depositors in a bank asserting rights under Section 34 of the Act enacted in 1946 in response to the Court's decision in *Markham* v. *Cabell,* 326 U.S. 404, which "allowed nonenemy creditors of former owners of vested property to bring suit under a World War I statute, [Section 9(a) of the Act] and recover directly out of vested assets." *Honda, supra* at 487. The Court carefully analogized the situation of these depositors to creditors pursuing claims under the Bankruptcy Act, 11 U.S.C. § 93(n). Legislative and judicial history is cited in support of the analogy. Under the Bankruptcy Act failure of a creditor to file his claim within a prescribed time did not bar recovery of assets of the bankrupt remaining in the hands of the trustee. The Court concluded, "the statutory purpose is best served by invoking the equitable doctrine of tolling to preserve petitioners' action in which they seek payment on the same basis as that accorded the claimants" who timely sued to obtain adjudication of the rate of exchange issue. *Honda, supra* at 500.

We are not at liberty to invoke here an equitable tolling encompassing the time the corporation's claim was pending. In the first place all claimants in *Honda* were creditors; that is, they were in the same category. There was no

distinction between them such as exists between a corporation and a non-enemy segment of its shareholders. In the second place, the analogy to the Bankruptcy Act does not apply because the time periods for filing claims under that Act, and under Section 34 involved in *Honda*, were for the benefit of the claimant creditors, whereas here the periods of limitations are for the purpose of expediting administration of the Act and closing out its operations. Moreover, for all that appears from the record appellants, from July 22, 1951 to July 22, 1964, deliberately chose, in contrast with the situation in *Honda*, to place their fate with that of the corporation. It was only when the latter's claim failed—when the corporation did not succeed in freeing itself of enemy character—that appellants separated themselves from the corporation.[8]

The periods of limitations applicable to those who seek return of vested property apply to appellants. Though the argument that the corporation's claim covered their shareholding interests has plausibility, we do not think that claim can be said to be a claim for the shareholders as such. It was for the corporation. It was not simply a claim for the interests of these non-enemy shareholders, but for all the vested corporate assets. Though it covered the total, and therefore the parts, it was not for the separate parts.

In the end our problem is to interpret the Act as we consider Congress intended. With that in mind we think appellants failed in timely fashion to pursue whatever remedies, if any, the Act afforded them.

Affirmed.

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[8] *Kaufman* v. *Societe Internationale*, 343 U.S. 156, which appellants contend establishes their rights to a pro-rata share of the vested corporate assets, was decided April 7, 1952.

APPENDIX D

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Civ. 85-31

LEO TATERKA, *Plaintiff*,

v.

HERBERT BROWNELL, JR., United States Attorney General, *Defendant.*

Memorandum

SUGARMAN, D.J.

Defendant moves for summary judgment in a suit brought against him by plaintiff, a citizen of the United States under Title 50 Appendix U.S.C.A. § 9(a).

The basic question posed is whether a non-enemy stockholder of an enemy-domiciled corporation may have the value of his stock out of the assets of said corporation seized pursuant to the act.

I am constrained to hold that he may, because of language in the dissenting opinion in *Kaufman, et al.* v. *Societe Internationale Pour Participations Industrielles et Commeciales, S.A., et al.*, 343 U.S. 156 at 168.

In that case the prevailing opinion states, at page 159,

> "Our holding is that when the Government seizes assets of a corporation organized under the laws of a *neutral* country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected. This holding is not based on any technical concept of derivative rights appropriate to the law of corporations. It is based on the Act which enables one not an enemy as defined in § 2 to recover any interest, right or title which he has in the property vested. The innocent stockholder may not have title to corporate assets, but he does have

> an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies." (Emphasis supplied).

I would be indisposed to ascribe to that language a meaning that the same result necessarily obtained where the corporation was *enemy-domiciled* but for the construction placed upon the majority opinion by the dissent. Mr. Justice Reed, with whom The Chief Justice and Mr. Justice Minton joined, warned at page 168 that

> "[W]e see no real difference, as to liability to have assets vested under the Trading with the Enemy Act, between a corporation *enemy-dominated* as this is alleged to be and an *enemy-domiciled* corporation producing munitions of war for use against the United States. The Court's opinion refers only to *enemy-dominated neutral* corporations but the theory of recovery for friendly stockholders appears to be equally applicable to friendly stockholders of *enemy corporations.*" (Emphasis supplied).

Although that question was not then before the Court, I feel bound to accept the result, determinative of the issue here posed, which the minority said would flow from the holding, particularly when the majority chose to remain mute thereon.

Accordingly, defendant's motion for summary judgment is denied.

Settle order.

Dated: November 23, 1953
New York, New York

.....
United States District Judge

Filed June 30, 1967

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1966

Civil 2984-65

No. 20,520

ALMA AGAJAN, ET AL., *Appellants*

v.

RAMSEY CLARK, Attorney General of the United States, *Appellee*

APPEAL FROM the United States District Court for the District of Columbia.

Before: Fahy,* Burger and McGowan, Circuit Judges.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Fahy

Dated: June 30, 1967

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 643

ALMA HELM AGAJAN, ET AL., PETITIONERS

v.

RAMSEY CLARK, ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The single question presented in this case is whether petitioners may maintain an action for the recovery of property vested under the Trading with the Enemy Act without filing a timely notice of claim as required by Section 33 of the Act, 50 U.S.C. App. 33. That Section provides in pertinent part that—

> No return may be made pursuant to section 9 or 32 * * * unless notice of claim has been filed

> * * * in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from February 9, 1954, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. * * *

Petitioners are a group of individuals (or their successors in interest) claiming to be nonenemy stockholders of a Hong Kong corporation (Helm Bros., Ltd.) whose assets in the United States were vested in 1950 [1] by the Alien Property Custodian as enemy property. The corporation, on July 22, 1951, filed with the Custodian an administrative claim for the return of the vested corporate property. This claim was denied on July 22, 1964 upon a finding by the Custodian that after December 7, 1941 (1) the corporation had its principal place of business in Yokohama, Japan, and (2) that it had been controlled, at the outbreak of World War II, by citizens and residents of Japan and was thus an "enemy" within the meaning of the Trading with the Enemy Act.

Under the limitations provisions of Section 33, *supra*, the petitioners, as shareholders, had until February 8, 1955 to file a notice of claim with respect to any rights which they wished to assert as individuals in the vested corporate property. This they did not do until October 8, 1965—some ten years after the period of limitations had expired. The dis-

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[1] Vesting Order No. 16313, 15 Fed. Reg. 9549 (December 8, 1950), as amended, 16 Fed. Reg. 1112 (January 19, 1951).

trict court dismissed the complaint on the ground that the petitioners failed to file a timely notice of claim with the respondent—a jurisdictional prerequisite to suit under the Act. The court of appeals affirmed.

Petitioners argue (Pet. 8-9) that the notice of claim filed by the Corporation should also be considered as having been filed on behalf of the individual stockholders. The court of appeals properly rejected this contention, stating (Pet. 10a):

> [The corporate notice of claim] was not a notice of claim of these * * * [petitioners]. It did set forth details respecting all the corporation's shareholders, with their names and addresses, nationalities and percentages of ownership. But it would overstrain the structure and language of the Act to construe this notice as one filed by the shareholders. Neither in the language of the Act nor elsewhere is there evidence of an intention on the part of Congress that a corporate entity should be considered to be identical with the individual entities who are its shareholders.

Petitioners urge, in the alternative (Pet. 14-15), that if they may not rely on the corporate notice of claim, the pendency of the corporate claim from 1951 until 1964 should be regarded as having tolled the statute of limitations as to them. Section 33 of the Act, 50 U.S.C. App. 33, provides that in computing the period during which the notice of claim must be made and suit instituted, "* * * there shall be excluded any period during which there was pending a suit or claim for return * * *." The court of appeals

properly rejected this argument as being without substance, holding that (Pet. 12a)—

> * * * the language of the Act excluding from the two-year period the time a claim was pending refers to a claim for the same interest involved in the suit which is filed; and we have expressed our opinion that the suit of these shareholders is not for the same interest involved in the claim of the corporation; so that the corporation's claim did not serve to toll the time within which the shareholders were required to sue.

There is no merit to petitioner's contention that the application of the limitation provision to bar their claim is inequitable because the claim filed by the corporation gave the Custodian all information that he would have acquired if the shareholders had filed individual claims (Pet. 6-7, 15). The short answer to this argument is that the corporate claim did not provide the most important item of information concerning the individual claims—that these particular individuals were claiming to be non-enemy persons entitled individually to property in respondent's possession. The question of a corporation's status as an "enemy" raises factual issues discrete from the question of the "enemy" status of a particular shareholder. See, generally, *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (C.A. D.C.), certiorari denied, 370 U.S. 940. Thus, the filing of a claim by the corporation did not put respondent on notice that he would have to make a factual determination of the "enemy" status of each of the shareholders. "The policy of statutes of limitations is to encourage prompt-

ness in the bringing of actions, so that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory." *Missouri, Kansas & Texas Railway Company* v. *Harriman*, 227 U.S. 657, 672. This policy clearly applies in the instant case, where respondent did not receive the notice of petitioners' claims that they were non-enemies and entitled to a share of the corporation's assets until October 1965, more than ten years after the expiration of the period which Congress explicitly provided.

Nor does this Court's decision in *Honda* v. *Clark*, 386 U.S. 484, require the tolling of the limitation period in the instant case. In *Honda*, the petitioner had filed timely claims, *id.* at 488, but had failed to bring a suit contesting the Attorney General's determination of the rate of exchange to be applied in valuing their claims within the time prescribed by the statute. The Court there found a tolling of the statute of limitations because it concluded that the petitioners had reasonably withheld individual action during the pendency of a class action raising the identical question. Here, on the other hand, petitioners did not file a notice of claims until 10 years after the limitations period had expired and, as noted above, the adjudication of the suit by the corporation involved issues distinct from those raised by the claims of the individual shareholders.

In sum, the timely claim filed on behalf of the corporation in which petitioners claim to own stock cannot be construed as a claim on behalf of these peti-

tioners. The corporate claim was not filed as a representative claim on behalf of any shareholders.[2] Thus, the courts below correctly applied Section 33 in accordance with its plain terms.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

OCTOBER 1967.

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[2] Petitioners can derive no benefit from this Court's decision in *Kaufman* v. *Societe Internationale*, 343 U.S. 156 (Pet. 18-19). While the Court there permitted certain non-enemy stockholders in an enemy-tainted corporation to intervene in a suit by the corporation, and to assert in their own right an interest in vested corporate assets, it is clear that the assertion of the interest by non-enemy shareholders was seasonable. 343 U.S. at 161. Nothing said in *Kaufman* supports petitioners' basic contention that they need not make known and assert their rights by a timely claim. There is no support for such an exception in the statutory language or in judicial decisions. See *Ladue* v. *Brownell*, 220 F.2d 468 (C.A. 7), certiorari denied, 350 U.S. 823.

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